INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	7
Argument: Reasons for Denying the Writ	16
I. No Reason for Granting a Review on Writ of Certiorari Is Disclosed Either by the Petition, by the Opinion of the Court of Appeals, or by the Record in This Case	16
II. The Decision Below Is Clearly Correct	22
Conclusion	23

TABLE OF CITATIONS.

Cases:	Page
United States v. Johnson, 268 U. S. 220	18
Rules:	
Rules of the Supreme Court of the United States:	
Rule 19	16, 21
Rule 23(1)(j)	14, 16
Federal Rules of Appellate Procedure:	
Rule 41(a)	15
Rule 41(b)	14
Federal Rules of Civil Procedure:	
Rule 50(c)	3, 10, 12
Rule 51	6
Rule 58(2)	9
Code:	
28 U. S. C. § 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1169

DEVAL AERODYNAMICS, INC.,
A PENNSYLVANIA CORPORATION,

DEVAL AERODYNAMICS, INC.,
A DELAWARE CORPORATION,

Petitioners

v.

GEORGE R. EULO,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. 23-36) is reported at 430 F. 2d 325. The opinion of the District Court for the Eastern District of Pennsylvania (Pet. 37-53 and App. 109a-126a) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 7, 1970. A petition for rehearing was denied by the Court of Appeals *en banc* on September 25, 1970. The petition for a writ of certiorari was filed on December 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

In a federal diversity contract action for unpaid compensation for services rendered to the corporate defendants (the petitioners herein) in securing for them government contracts in a gross amount of more than $3,000,000, payment of which they received, where plaintiff (the respondent) received only $20,362 for such services (which, he claimed, was on account of an oral 5% commission agreement, and which defendants claim was the only compensation to which he was entitled under what they claim was an oral agreement with him to pay a bonus if the contracts he secured proved profitable), the jury rendered a special verdict in favor of the plaintiff and against each of the corporate defendants in the amount of $135,981.33 on plaintiff's *quantum meruit* claims, finding this to be the fair and reasonable value of plaintiff's services in excess of the amounts paid him, after finding that there was no express agreement between the parties as to compensation as claimed by either of the parties.

After entering judgment in the amount of $135,981.33 in favor of the plaintiff and against the corporate defendants, the District Court granted judgment n.o.v. in favor of the corporate defendants, entering judgment in their favor and for certain other defendants, and ordered

alternatively, pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, that, in the event the order granting judgment n.o.v. is reversed or vacated, the corporate defendants' motion for a new trial shall be granted, limited to the issues between plaintiff and the corporate defendants relating to plaintiff's claim for "additional compensation" for the services thus rendered.

The Court of Appeals reversed the judgment of the District Court to the extent it granted judgment n.o.v. and alternatively ordered a new trial in favor of the corporate defendants, directing that the jury verdict based on plaintiff's *quantum meruit* claim should be reinstated if, on remand, it is ultimately determined that a certain letter agreement between the parties is not a bar to plaintiff's action.

The following questions are presented:

1. Where a decision of a federal court of appeals merely held that (a) it "cannot express an opinion" on whether or not a certain letter agreement was a "release" or an "unbreached executory accord" barring plaintiff's claim, as defendants contend, because the district court erroneously barred the parties from making a complete record on this issue, ruling at the trial "as a matter of law" that the agreement constituted no defense (which ruling the district court later reversed in granting judgment n.o.v.), erroneously interpreting the agreement "without allowing the parties to at least develop evidence concerning the circumstances prior to and contemporaneous with its making", resulting in "serious deficiencies in the present record" and that, therefore (b) "the judgment n.o.v. must be reversed and the case remanded to the district court" to "afford the parties an opportunity to offer evidence relevant to the task of interpreting the agreement and determining whether the agreement does present an

absolute defense" and to give the plaintiff an opportunity to present evidence supporting his contention of fraud which might constitute breach of an executory accord or show that the agreement can be avoided because of fraud in its making—should this Court grant certiorari to review that decision?

2. Where a decision of a court of appeals rejected defendants' contention that they were entitled to judgment n.o.v. on the alleged ground that "there was no competent evidence to support the jury's determination of the amount of *quantum meruit* damages", the court of appeals pointing out that plaintiff "did testify throughout concerning his duties and what he believed they were worth" and that a party is competent to testify in his own behalf, and where the district court had previously rejected defendants' motion for a new trial based on the same alleged ground, holding that "the jury had the right to pick and choose, and could accept parts of the testimony of each of several witnesses, put the parts together, and arrive at a composite calculation"—should this Court grant certiorari to review that decision of the court of appeals?

3. Where a decision of a court of appeals reversed an alternative order of the district court granting a new trial, holding that the record did not support "the trial judge's apprehensions" that the language of his jury instructions and of the special interrogatories may have left the jury with the impression that, if they were to reject the contentions advanced by each side concerning an express employment contract, they would be compelled to award plaintiff a recovery based on *quantum meruit*—should this Court grant certiorari to review that decision?

4. Where the district court granted a new trial on the ground that any verdict against defendant corporation

which exceeded $40,000 would be against the weight of the evidence and contrary to public policy because a public offering prospectus of the corporation contained a statement (without plaintiff's prior knowledge or approval) that plaintiff "may receive [a bonus] based on the company's sales performance which is not expected to exceed $40,000" and because, the district court stated, "to permit recovery in excess of that amount would mean that the prospectus contained a serious misrepresentation of fact, in clear violation of the Securities Act of 1933", and where the court of appeals reversed the district court, holding that the district court erred in finding as a matter of law that plaintiff had acquiesced in the prospectus representation (notwithstanding plaintiff's testimony to the contrary that he had complained to the corporation's president and controlling stockholder about this erroneous statement), that "the evidence of acquiescence in the record is sparse", that "at best it posed a jury issue", that defendants did not plead or argue a public policy defense based on acquiescence and the jury was not requested to make findings on this issue, and that, to the extent the prospectus statement and plaintiff's alleged acquiescence in it constituted evidence of an express employment agreement, they presented a jury issue which the verdict "clearly indicates" the jury resolved against the corporation so that it was error to rely on plaintiff's alleged acquiescence as a reason for concluding that the verdict was against the weight of the evidence—should this Court grant certiorari to review that decision of the court of appeals?

5. Should this Court grant certiorari to review a decision of the court of appeals rejecting defendants' contention that they are entitled to a new trial because the district court refused defendants' vague request that the jury be instructed concerning the alleged "illegality" of plaintiff's "contract for compensation" where the requested charge

does not appear in the original record, where defendants failed to supply the court of appeals with a copy of their request (except belatedly in their petition for rehearing, which the court of appeals denied), where defendants did not object, as required by Rule 51 of the Federal Rules of Civil Procedure, to the district court's failure to give the requested instruction, and where defendants' request and their "illegality" defense were obviously without merit under the facts in this case?

STATEMENT OF THE CASE

This contract action was commenced in 1962 by plaintiff George R. Eulo (respondent), a New Jersey citizen, against his former employers, DeVal Aerodynamics, Inc., a Pennsylvania manufacturer, and DeVal Aerodynamics, Inc., its Delaware holding company (both defendant corporations, the petitioners herein, being referred to as "DeVal"), and against Charles A. Russo, the former president, chief executive officer and controlling stockholder of DeVal, a Pennsylvania citizen.[1] The jurisdiction of the district court was invoked because of diversity of citizenship.

In this action plaintiff Eulo seeks unpaid compensation owed him by DeVal for services rendered by him to the corporate defendants during the period between March 15, 1959[2] and May 9, 1961, when he became president of DeVal, in securing for them government contracts in a gross amount of more than $3,800,000, payment of which these corporations had received. For such services they had paid Eulo only $20,362 which, he claimed, was on account of an oral 5% commission agreement as advances against commissions to cover day-to-day expenses.

Eulo's primary claim is that the corporate defendants had orally agreed, through their president Russo, to pay him a 5% commission on all government contracts he secured for them, calculated on the gross price of the contracts. Alternatively, he seeks a *quantum meruit* recovery. Eulo testified [App. T. 117-118] that there was never any termination of his 5% commission arrangement from the

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1. The Court of Appeals affirmed judgments in favor of Russo's estate, on plaintiff's personal liability claim against him, and for John Baldinger, a Pennsylvania citizen who succeeded Eulo as president of DeVal when his employment was terminated. Review of these judgments is not sought by the petition for certiorari.

2. The opinion of the Court of Appeals, as printed in the appendix to the Petition for a Writ of Certiorari, through a printing error (Pet. 24), erroneously states this date as March 15, 1969.

time he made it in March, 1959 with Russo [App. T. 27-28, 31, 196-199] until the time it ended when he became president of DeVal in May, 1961. During that period Eulo received a total of only $20,362 in weekly and other payments [App. 11a-12a, 46a], all of which payments Eulo contends were made to him, pursuant to said oral agreement, as retainers or advances toward expenses to be deducted from the total 5% commission compensation to be received by him [App. 10a-12a; App. T. 33-39, 61-62, 206-207, 212, 215-216].

On the other hand, defendants have contended that there was no agreement with Eulo for commissions in any amount but that they had an oral agreement with him that, if DeVal made a profit on the government contracts secured by Eulo, he would receive a bonus in addition to a weekly salary [App. T. 622-623; App. 45a, 110a-111a]. Defendants insist that the $20,362 paid Eulo constituted the total compensation to be received by him subject only to the possibility of a bonus which was not payable because, defendants claim, the government contracts were not profitable. However, defendants admit [App. T. 78-79] that Eulo obtained and secured more than $3,800,000 in government contracts for DeVal "through valuable services rendered" by him to DeVal from March, 1959 to May 9, 1961 [App. 12a; P-3 (App. 135a) and P-20 (App. 176a)]. Defendants further admit [App. T. 556-557] that DeVal invoiced and received full payment from the government of that amount in excess of $3,800,000. [See P-3 (App. 135a) and P-20 (App. 176a).] Whether or not the government contracts secured by Eulo proved to be profitable to DeVal, it is very clear and admitted by defendants that it was Russo, and no one else, "who made the final determination as to the amount of the bid" in connection with each government contract [App. T. 788-793]. During the period in question Eulo never determined the price bid submitted by DeVal on government contracts, except in the case of spare part orders which con-

stituted only a very small portion ($220,000) of the government work which Eulo secured for DeVal [App. T. 64-66; 377-379].

In seeking a *quantum meruit* recovery, in the event no express oral contract existed in fact or law, Eulo has claimed the same amount (calculated on the same 5% basis) for the fair and reasonable value of his services to the corporate defendants.

On February 13, 1968, after a trial of nine days, a jury rendered a special verdict on interrogatories in favor of plaintiff Eulo and against each of the corporate defendants in the amount of $135,981.33 on plaintiff's *quantum meruit* claims, finding this to be the fair and reasonable value of plaintiff's services in excess of the amounts paid him, after finding that there was no express agreement between the parties as to compensation either as claimed by plaintiff or by defendants.

Judgment in the amount of $135,981.33 in favor of Eulo and against the corporate defendants was entered on September 24, 1968, pursuant to an order of the District Court dated September 23, 1968. The Court of Appeals noted in its opinion (Pet. 25, n. 6) that there had been a delay of more than seven months in the entry of judgment after the date of the verdict which, "in view of the express language of Fed. R. Civ. P. 58, we cannot understand. . . ." Since it appeared that entry of judgment on this verdict was being inexplicably delayed by the trial judge,[3] plaintiff filed a motion [App. 92a-97a] on March 19, 1968 that judgment be entered promptly for the plaintiff in accordance with the verdict pursuant to the mandate of Rule 58(2) of the Federal Rules of Civil Procedure. Notwith-

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3. The Clerk's Docket recorded the verdict in favor of plaintiff on February 13, 1968 but also had the following notation entered as of that date: "Judgment not to be entered at this time." [App. 2a].

standing, the district judge delayed another six months before ordering that judgment be entered.

On September 30, 1968 the corporate defendants formally filed a motion for judgment notwithstanding verdict and an alternative motion for a new trial [App. 106a], which motions they had informally submitted to the trial judge not later than April, 1968. In an opinion and order [Pet. 37-53; App. 109a-126a] filed March 28, 1969, the trial judge granted the motion of the corporate defendants for judgment n.o.v. in their favor and entered judgment for them. Alternatively, he ordered, pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, that, in the event the order granting judgment n.o.v. is reversed or vacated, the corporate defendants' motion for a new trial shall be granted "limited to the issues between plaintiff and the corporate defendant relating to plaintiff's claim for additional compensation for services rendered between March 15, 1959 and May 9, 1961." Said order also entered judgment on the verdicts in favor of the remaining defendants.

The only ground stated by the district judge in his opinion [Pet. 37, 42-47; App. 109a, 114a-120a] for granting defendants' motion for judgment n.o.v. was that, notwithstanding his clear and strongly-stated decision to the contrary during the trial, he is "now convinced" that his ruling was erroneous and "it is clear" that a certain letter agreement dated May 9, 1961 [D-22; App. 187a; Pet. 27-28, 43-44] signed by plaintiff was a "present release" by him extinguishing his claims against the defendant corporations upon which the jury awarded him damages. His opinion stated [Pet. 45; App. 117a-118a] in part: "I concluded at the time of the trial that, since plaintiff had not received the stock, and since the time within which the release agreement contemplated that he would receive it had expired, plaintiff was at liberty to disregard the release and reinstate and sue upon the original obligation of the de-

fendant corporation. I am now convinced that this ruling was erroneous: it is clear that the plaintiff was granting a present release, in exchange for a conditional promise of substituted performance."

At the trial, in response to the contention of defendants' counsel that this letter [D-22] was a "present release", District Judge Fullam stated: "Well, it certainly is not that. Whatever else it may be it is not that." [App. T. 586]. District Judge Fullam further stated [App. T. 720, 722]:

> "It seem[s] to me rather obvious that as a matter of law this release doesn't constitute a defense. It is not a release. It never went into effect by its own terms." [App. T. 720]
>
> "I am declaring as a matter of law that as far as this case is concerned the release whether it be regarded executory accord or what have you, does not constitute a defense." [App. T. 722][4]

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4. While District Judge Fullam stated in his opinion granting judgment n.o.v. [Pet. 45; App. 118a] that "it is clear that the plaintiff was granting a present release, in exchange for a conditional promise of substituted performance" [to deliver 20,000 shares to Eulo by May 9, 1962 upon Russo's receipt on that date from third parties of the balance of the purchase price of 100,000 shares Russo sold them], Judge Fullam pointed out at the trial that the condition in the "release" letter [D-22] had not occurred within the time contemplated [App. T. 720-721], that "once that year [ending May 9, 1962] expired without the transfer, the whole thing is out the window" [App. T. 721], that "either the thing is void under the rule against perpetuity, because it would go on forever, or else there would be an implied condition that it has to happen within a reasonable time under any circumstances" [App. T. 721] and that this agreement was not a "release" [App. T. 993], "was never carried out" [App. T. 995], "was an executory accord" or was not an executory accord [App. T. 995] but, in any event "is too late now" [App. T. 995] and "I have ruled as a matter of law that inasmuch as this agreement was not carried out it does not constitute a release" [App. T. 1028].

Pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, the District Court ordered alternatively that, in the event its order granting judgment n.o.v. is reversed or vacated, the corporate defendants' motion for a new trial shall be granted, limited to plaintiff's claim against the corporate defendants for "additional compensation" for services rendered between March 15, 1959 and May 9, 1961 [Pet. 52-53; App. 125a-126a].

The Court of Appeals noted [Pet. 8-9] that the District Court "advanced two reasons for its conclusion that a new trial was required":

1. The district judge "thought that the language of his jury instructions and of the special interrogatories may have left the jury with the impression that, if they were to reject the contentions advanced by each side concerning an express employment contract, they would be compelled to award Eulo a recovery based on *quantum meruit.*" The Court of Appeals concluded that "the trial judge's apprehensions are not supported by the record." [Pet. 32].

2. The district judge thought that any verdict against defendant corporation which exceeded $40,000 would be against the weight of the evidence and contrary to public policy because a public offering prospectus of the corporation contained a statement that plaintiff "may receive [a bonus] based on the company's sales performance which is not expected to exceed $40,000" and because, the district judge stated, "to permit recovery in excess of that amount would mean that the prospectus contained a serious misrepresentation of fact, in clear violation of the Securities Act of 1933" [Pet. 50]. Even though the district judge acknowledged that the statement may have been included in the prospectus without plaintiff's knowledge or approval, as plaintiff testified, the judge found, as a matter of law, that plaintiff had "acquiesced" in the prospectus represen-

tation. The district judge ignored plaintiff's testimony that he had complained to Russo, the corporation's president and controlling stockholder, about this erroneous statement, but Russo told him not to worry about it [App. T. 81-82, 298-300]. In reversing, the Court of Appeals held that the District Court erred in finding as a matter of law that plaintiff had acquiesced; that "the evidence of acquiescence in the record is sparse"; that "at best it posed a jury issue"; that defendants did not plead or argue a public policy defense based on acquiescence and the jury was not requested to make findings on this issue; and that, to the extent the prospectus statement and plaintiff's alleged acquiescence in it constituted evidence of an express employment agreement, they presented a jury issue which the verdict "clearly indicates" the jury resolved against the corporation so that it was error to rely on plaintiff's alleged acquiescence as a reason for concluding that the verdict was against the weight of the evidence [Pet. 33-34].

Upon plaintiff's appeal, the Court of Appeals for the Third Circuit reversed the judgment of the District Court to the extent it granted judgment n.o.v. and alternatively ordered a new trial in favor of the corporate defendants. The Court of Appeals further directed that the jury verdict in favor of the plaintiff and against each of the corporate defendants in the amount of $135,981.33 based on Eulo's *quantum meruit* claim "should be reinstated" "if on remand it is ultimately determined that the instrument [letter agreement dated May 9, 1961; D-22] is not a bar to Eulo's action." [Pet. 35-36]. The judgment entered on the jury verdicts in favor of the remaining defendants was affirmed.

The opinion and judgment of the Court of Appeals were filed and entered on August 7, 1970. The opinion is reported at 430 F. 2d 325 and is printed in the appendix to the Petition for a Writ of Certiorari at Pet. 23-36. The judgment of the Court of Appeals which petitioners seek to have this

Court review is not included in the appendix to said Petition, as required by Rule 23(1)(j) of this Court, or printed elsewhere in the Petition. Accordingly, the full text of said judgment is set forth below:

"JUDGMENT"

"This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court that that portion of the judgment of the said District Court, filed March 28, 1969, which grants judgment N. O. V. and alternatively orders a new trial in favor of DeVal Aerodynamics, Inc., be, and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion of this Court. That portion of the said judgment entered on the jury verdicts in favor of the remaining defendants be, and the same is hereby affirmed.

Attest:
T. F. Quinn
Clerk

"Dated: August 7, 1970"

A petition for rehearing was denied by the Court of Appeals *en banc* on September 25, 1970. Upon defendants' motion, on October 13, 1970 the Court of Appeals entered an order, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, "that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 2, 1970." Upon defend-

ants' motion for further stay of the mandate until December 2, 1970, the Court of Appeals entered an order on November 2, 1970 "that the issuance of the mandate be and it hereby is further stayed to November 16, 1970, and it is further ordered that no further extension will be granted." On December 23, 1970 the Clerk of the Court of Appeals mailed to the Clerk of the District Court a certified copy of the judgment in lieu of a formal mandate in accordance with Rule 41(a) of the Federal Rules of Appellate Procedure. Defendants filed their Petition for a Writ of Certiorari with this Court on December 24, 1970. Subsequently, they filed with the Court of Appeals a petition "to stay the mandate until final disposition by the Supreme Court and to recall from the District Court the certified copy of the judgment in the above-entitled case." This petition was denied on January 8, 1971.

The reasons given by the Court of Appeals for reversing the judgment of the District Court to the extent it granted judgment n.o.v. and alternatively ordered a new trial in favor of the corporate defendants have been summarized in the Questions Presented and are discussed elsewhere in this brief.

ARGUMENT:
REASONS FOR DENYING THE WRIT

I. No Reason for Granting a Review on Writ of Certiorari Is Disclosed Either by the Petition, by the Opinion of the Court of Appeals, or by the Record in This Case.

Petitioners have presented argument in support of their position that the Court of Appeals, and even the District Court, erred in deciding various factual and other issues in this case. However, petitioners seem to overlook the need for them to present reasons why this Court should exercise its discretionary power to grant a review of this case on writ of certiorari. Mindful of Rule 19 of this Court and of the practice of this Court in exercising its certiorari jurisdiction, it is clear that neither the petition, the opinion of the Court of Appeals nor the record in this case discloses any reason whatever for granting a writ of certiorari here.

The "Argument" in the petition, which Rule 23(1)(h) requires for the purpose of "amplifying the reasons relied on for the allowance of the writ (see Rule 19)", obviously fails to meet this requirement. Merely listing petitioners' five headings describing the points presented under their "Argument" indicates this failure. They are as follows:

1. Eulo Released DeVal of All Claims (Pet. 12).

2. There Is No Evidence in the Record as to the Value of Eulo's Services as a Full Time Sales Executive (Pet. 13).

3. A New Trial Should Be Granted as to the Quantum Meruit Finding Which Is Against the Weight of the Evidence (Pet. 16).

4. DeVal's Request for Instructions on Illegality of Contract Is in the Original Record of the District Court and Is Available (Pet. 18).

5. The Circuit Court Erroneously Reversed the District Court's Grant of a New Trial Based on Illegality by Violation of Securities Act of 1933 (Pet. 19).

These non-certiorari oriented headings are not misleading. The argument under each heading is intended to support the point made in the heading, though this is not done successfully. Not a single valid reason for granting the petition for certiorari is given under petitioners' "Argument" or elsewhere in the petition. This is emphasized by petitioners' "Conclusion" to their petition (Pet. 22) which states in its entirety as follows:

> "The Court should not only uphold the District Court's entry of judgment n.o.v. as to release, but should also do so as to the quantum meruit verdict because of Eulo's failure to present a scintilla of evidence in support of such a verdict. Eulo is challenged to specify where, in a record which 'is somewhat thin on this damages issue,' there is any evidence of the value of services of a full-time sales executive. In the interest of justice, a new trial should be granted on the issues of quantum meruit, interest on disputed, unliquidated claims, illegality resulting from influence peddling, and from violation of Securities Act of 1933.
>
> "For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit."

What petitioners really seek from this Court is a complete review of every issue reviewed by the Court of Appeals or decided by the District Court, plus some new issues —not a writ of certiorari granted on one or more of the valid grounds upon which this Court will grant that discretionary writ.

This case, the decisions of the courts below and the ultimate disposition of this litigation are of great importance to the respondent and the petitioners. But the importance of this case, of the decision of the Court of Appeals, and of the issues involved here, is nothing from the viewpoint of this Court in determining whether there is anything here which warrants granting a writ of certiorari.

A reading of the very lucid opinion of the Court of Appeals, or the District Court's opinion, or even the petition itself, will establish very quickly that the decision below and the issues raised turn upon the specific facts involved in this case. When review is sought of a Court of Appeals decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments such as what is involved in this case, particularly in private contract litigation such as this, it would be most unusual for this Court to grant certiorari. As this Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U. S. 220, 227.

Even more than the fact that the issues involved in this case relate only to the specific facts of this case, including the reasonable value of plaintiff Eulo's services and a specific letter agreement properly interpreted, is the fact that the Court of Appeals concluded that it did not have and the district judge did not have enough evidence or facts upon which to make a factual determination. Will this Court wish to review a case with such a record?

Thus, for example, in reversing the District Court for granting a judgment n.o.v. on the ground that a certain letter agreement signed by plaintiff was a "present release" which barred plaintiff from recovering the damages

which the jury awarded him, the Court of Appeals held that it "cannot express an opinion" on whether or not this letter agreement was a "release" or an "unbreached executory accord" barring plaintiff's claim because the District Court erroneously barred the parties from making a complete record on this issue and erroneously interpreted the agreement "without allowing the parties to at least develop evidence concerning the circumstances prior to and contemporaneous with its making", resulting in "serious deficiencies in the present record". The Court of Appeals therefore concluded that "the judgment n.o.v. must be reversed and the case remanded to the district court" to "afford the parties an opportunity to offer evidence relevant to the task of interpreting the agreement and determining whether the agreement does present an absolute defense" and to give the plaintiff an opportunity to present evidence supporting his contention of fraud which might constitute breach of an executory accord or show that the agreement can be avoided because of fraud in its making. Pet. 29-32.

With such a unanimous conclusion by a distinguished panel of the Court of Appeals for the Third Circuit, with a petition for rehearing denied by the Court *en banc*, with the Chief Judge and six other circuit judges present, and with the possibility that another petition for certiorari may be presented in the future after "serious deficiencies in the present record" are cured upon remand, would this Court wish to grant a writ of certiorari particularly at this time?

The only questions presented or argument points in the petition which contain any words with even a superficial "certiorari" flavor, though they obviously have no merit, are the issues raised by petitioners suggesting (a) that there was some "illegality" in the services rendered by plaintiff to the defendant corporations because of some

"influence peddling" which petitioners would like to impute to plaintiff even though there is nothing in the record to support this (see Pet. 4 and 18-19) and (b) that permitting plaintiff to recover more than $40,000 in accordance with the jury's verdict would result in a violation of the Securities Act of 1933.

With respect to the "illegality" point the District Court not only refused defendants' request for jury instructions on this point but did not think it warranted any discussion or even mention in its opinion granting judgment n.o.v. and, alternatively, a new trial. The Court of Appeals referred to the issue but dismissed it very quickly (Pet. 35).

This case does *not* involve the Securities Act of 1933 or any violation thereof. The district judge was only worried that a violation might result if plaintiff were permitted to recover more than $40,000 and that worry was based upon the district judge's finding, as a matter of law, that plaintiff had "acquiesced" in a certain representation which defendant corporation had included in its public offering prospectus. However, the Court of Appeals disposed of this issue very decisively and properly, stating (Pet. 33-34):

> "In our view the district court's finding that Eulo had acquiesced in the prospectus representation is erroneous. The evidence of acquiescence in the record is sparse. At best it posed a jury issue. The defendants, however, did not plead or argue a public policy defense based on acquiescence and the jury was not requested to make findings on this issue. In view of these factors, we conclude the district court committed error in resolving this issue against Eulo. Thus, it follows that this erroneous conclusion, which is essential to the public policy defense, cannot justify the order for a new trial on the ground that a jury verdict in excess of $40,000 would violate public policy."

The Court of Appeals also held that the district court erred in relying on Eulo's alleged acquiescence in the prospectus representation as a reason for concluding that the verdict was against the weight of the evidence because, "to the extent the prospectus statement and Eulo's alleged acquiescence in it constitute evidence of an express employment agreement, they presented a jury issue" and "the jury's verdict clearly indicates they resolved this issue against DeVal." [Pet. 34].

Again mindful of Rule 19 of this Court indicating considerations governing review on certiorari, it is *very* apparent from the petition, the opinion of the Court of Appeals and the entire record in this case that—

1. The Court of Appeals has *not* rendered a decision here which is in conflict with the decision of another court of appeals on the same matter.

2. The Court of Appeals has *not* decided any important state question here which conflicts in any way with applicable state law.

3. The Court of Appeals has *not* decided here any important question of federal law which has not been, but should be, settled by this Court, or any federal question which conflicts in any way with applicable decisions of this Court.

4. The Court of Appeals has *not* in any way whatsoever in this case departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. *A fortiori*, there not been such a departure so far as to call for an exercise of this Court's power of supervision.

In short, there is no reason for granting a writ of certiorari here.

II. The Decision Below Is Clearly Correct

The opinion of the Court of Appeals is so persuasive that nothing more need be said, beyond that previously stated herein, to demonstrate that the decision below is clearly correct. It speaks for itself.

The opinion reflects a very careful consideration by the Court of Appeals of all arguments presented by the petitioners and of other questions which the Court of Appeals considered.

If anything, it may be that the Court of Appeals gave the petitioners greater consideration on the "release" question than they deserve. Without attempting to give here the very compelling arguments which we briefed in the Court of Appeals, we believe that it would have been very proper for the Court of Appeals to have decided, on the existing record, not only that the judgment n.o.v. must be reversed but that the letter agreement signed by Eulo was no bar to his recovery.

Plaintiff did not give a "present release" when he executed the letter agreement of May 9, 1961. At most, he gave a conditional promise or agreement to release in the future on occurrence of a specified condition precedent, the timely receipt of 20,000 shares as specified, a condition precedent which has not materialized and can never materialize now. This was no "release". *At the most* it was a *promise* or *agreement to release*—a promise or agreement which defendants may not enforce because Eulo never received the consideration for which he bargained, namely (a) 20,000 shares of Carco stock (b) delivered not later than May 9, 1962, the date fixed by reference to the Russo-Lomasney agreement [D-31; App. 188a, 189a]. This failure of consideration and breach or non-performance of the promise to deliver 20,000 shares to Eulo discharged any duty Eulo might ever have had under the letter of May 9,

1961 to give a release. Even if the Russo-Eulo letter agreement of May 9, 1961 [D-22] did not expressly require delivery of the 20,000 shares to Eulo on or before May 9, 1962, the implied condition of such an agreement would have been delivery to Eulo within a *reasonable time*. Such timely delivery has not been made and no longer can be made nine years later in 1971. The Court of Appeals noted (Pet. 31) that Eulo also contends that, beginning with the letter agreement of May 9, 1961, the Russos have engaged in a course of conduct constituting a fraud on Eulo which gives additional reason for holding that this letter agreement is no bar to plaintiff's recovery in this action.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARNOLD R. GINSBURG,
Counsel for Respondent

January 21, 1971